



Nos. 81, 82

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

BRIEF FOR THE UNITED STATES

INDEX

Opinion below.....	Page 1
Jurisdiction.....	2
Questions presented.....	2
Statutes involved.....	2
Statement.....	4
1. The Indictments.....	4
2. Opinion and orders of the court below.....	13
Specification of errors to be urged.....	13
Summary of argument.....	14
Argument:	
I. The Court has jurisdiction of these appeals under the Criminal Appeals Act.....	19
II. The combinations and conspiracies charged in the indict- ments are unlawful under the Sherman Act:	
A. The price-fixing indictment.....	38
B. The monopoly indictment.....	52
Conclusion.....	56

CITATIONS

Cases:	
<i>Abie State Bank v. Bryan</i> , 282 U. S. 765.....	22
<i>American Equipment Co. v. Tuthill Bldg. Material Co.</i> , 69 F. (2d) 406.....	26
<i>Bement v. National Harrow Co.</i> , 186 U. S. 70.....	25, 44
<i>Blount Mfg. Co. v. Yale & Towne Mfg. Co.</i> , 166 Fed. 555.....	47
<i>Brinkerhoff-Faris Co. v. H&H</i> , 281 U. S. 673.....	22
<i>Continental Paper Bag Co. v. Eastern Paper Bag Co.</i> , 210 U. S. 405.....	23
<i>Eastern States Lumber Ass'n v. United States</i> , 234 U. S. 600.....	18, 51
<i>Enterprise Irrig. Dist. v. Canal Co.</i> , 243 U. S. 157.....	22
<i>Ethyl Gasoline Corp. v. United States</i> , 309 U. S. 436.....	51
<i>Fashion Originators' Guild v. Federal Trade Commission</i> , 342 U. S. 457.....	25, 51, 54
<i>Fox Film Corp. v. Muller</i> , 296 U. S. 207.....	22, 37
<i>Interstate Circuit v. United States</i> , 306 U. S. 208.....	18, 26, 50
<i>Lawrence v. State Tax Comm.</i> , 286 U. S. 276.....	37
<i>Lynch v. Magnarox Co.</i> , 94 F. (2d) 883.....	46
<i>Montague & Co. v. Lowry</i> , 193 U. S. 38.....	51

II

	Page
<i>National Cotton Oil Co. v. Texas</i> , 197 U. S. 115.....	25, 54
<i>National Harrow Co. v. Hensch</i> , 76 Fed. 667, affirmed, 83 Fed. 36.....	46, 47, 48
<i>National Harrow Co. v. Quick</i> , 67 Fed. 130, affirmed, 74 Fed. 236.....	46
<i>Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.</i> , 154 Fed. 358, certiorari granted, 207 U. S. 589, dismissed per stipulation, 210 U. S. 439.....	25
<i>Standard Oil Co. v. United States</i> , 283 U. S. 163.....	17, 46, 48, 54, 55
<i>Standard Sanitary Mfg. Co. v. United States</i> , 226 U. S. 20.....	17, 25, 26, 40, 41, 42, 45
<i>United States v. Borden Co.</i> , 308 U. S. 188.....	20
<i>United States v. Colgate & Co.</i> , 253 Fed. 522, affirmed, 250 U. S. 300.....	51
<i>United States v. General Electric Co.</i> , 272 U. S. 476.....	25, 44
<i>United States v. Hastings</i> , 296 U. S. 188.....	21, 23, 37
<i>United States v. Malphurs</i> , 316 U. S. 1.....	35
<i>United States v. Masonite Corp.</i> , 316 U. S. 265.....	17, 26, 43, 44, 45, 47, 50, 56
<i>United States v. Motion Picture Patents Co.</i> , 225 Fed. 800.....	47
<i>United States v. New Departure Mfg. Co.</i> , 204 Fed. 107.....	47
<i>United States v. Nixon</i> , 235 U. S. 231.....	35
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U. S. 150.....	25
<i>United States v. Trenton Pottery Co.</i> , 273 U. S. 392.....	25
<i>Utley v. St. Petersburg</i> , 292 U. S. 106.....	37
<i>Ward v. Love County</i> , 253 U. S. 17.....	37

Statutes:

Act of July 2, 1890, c. 647, 26 Stat. 209, as amended by the Act of August 17, 1937, c. 690, 50 Stat. 693 (15 U. S. C. 1, 2) :	
Sec. 1.....	3
2.....	3
Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 401 (18 U. S. C. 682).....	3, 19
Judicial Code, Sec. 238 (28 U. S. C. 345).....	19

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 81

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

No. 82

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 27-43) ¹
is reported in 44 F. Supp. 949.

¹ All record references to the opinion will be to the record
in No. 81.

JURISDICTION

The jurisdiction of this Court is invoked on direct appeals taken under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 401 (18 U. S. C. 682), known as the Criminal Appeals Act, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (28 U. S. C. 345). The orders of the district court sustaining demurrers to the indictments were entered on February 24, 1942 (No. 81, R. 43; No. 82, R. 45). The orders allowing appeal were entered on March 26, 1942 (No. 81, R. 45; No. 82, R. 47). On April 10, 1942, appellces filed a statement opposing the jurisdiction of this Court. This Court, on May 25, 1942, postponed further consideration of the question of jurisdiction to the hearing of the cases on the merits (No. 81, R. 48; No. 82, R. 50).

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction of these appeals under the Criminal Appeals Act.
2. Whether the indictments charge activities which are not protected by the patent laws and which violate the Sherman Act.

STATUTES INVOLVED

The statutes primarily involved are Sections 1 and 2 of the Act of July 2, 1890, c. 647, 26 Stat. 209, as amended by the Act of August 17, 1937, c. 690, 50 Stat. 693 (15 U. S. C. 1, 2), known as

the Sherman Act. They provide in part as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 401 (18 U. S. C. 682), under which the jurisdiction of this Court is invoked reads in part as follows:

That an appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer * * * to any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment * * * is founded.

STATEMENT

These are direct appeals from judgments of the District Court for the Northern District of Illinois, Eastern Division, sustaining demurrers to two indictments founded upon the Sherman Act. Both indictments relate in general to the same activities; and the demurrers were heard together and disposed of by the district court in one opinion. Therefore, the appeals are being briefed and argued together in this Court.

1. THE INDICTMENTS

The indictment in No. 81 (R. 4-19) charges a conspiracy to fix the prices for the sale of computer pumps in interstate trade and commerce in violation of Section 1 of the Sherman Act. The indictment in No. 82 (R. 3-21) charges in the first count a conspiracy to monopolize the manufacture and sale of computer pumps, and in the second count a conspiracy to monopolize the manufacture and ^{sale} ~~purchase~~ of computing mechanisms, both in violation of Section 2 of the Sherman Act.

The defendants named in the price-fixing indictment (No. 81) are (R. 5-6): The Wayne Pump Company (Wayne), Gilbert and Barker Manufacturing Company (G & B), and Tokheim Oil Tank and Pump Company (Tokheim), all of whom are manufacturers and sellers of computer pumps, and certain officers of Wayne and G & B;

Veeder-Root, Incorporated (Veeder), a manufacturer of computing mechanisms, and certain of its officers; and Gasoline Pump Manufacturers Association (Association), an association of gasoline pump manufacturers of which Wayne, G & B, and Tokheim are members, and its secretary.

The defendants named in the monopoly indictment (No. 82) are the same, except that the Association and its secretary are not included (R. 4-5).

The articles of trade involved are (1) computer pumps, which are gasoline pumps embodying a computing mechanism (No. 81, R. 5; No. 82, R. 4), and (2) computing mechanisms, which are mechanical devices designed to calculate and register simultaneously the quantity and price of gasoline dispensed by the pump and which therefore are indispensable parts of computer pumps (No. 81, R. 5, 9; No. 82, R. 4, 8).

According to the indictments, the first computer pump was placed on the market in 1933. By 1939, the value of computer pumps sold comprised 91 percent of the dollar volume of all the gasoline pumps sold in the United States. The demand has shifted so rapidly from non-computer to computer pumps that in recent years it has been practically impossible for any gasoline pump manufacturer to remain in business unless he manufactured computer pumps. (No. 81, R. 8; No. 82, R. 7.)

In 1932 Wayne obtained a patent on a computer pump, known as the Jauch patent (No. 81, R. 8-9; No. 82, R. 7). Prior to that time, however, and during the period covered by the indictment, numerous other applications have been filed in the patent office for letters patent on computer pumps, computing mechanisms, and improvements thereon, and numerous patents on such subjects have been issued (No. 81, R. 8; No. 82, R. 7).

Wayne, G & B, and Tokheim are the three leading manufacturers of gasoline pumps in the United States. In 1939, they manufactured and sold 56 percent by value of all computer pumps sold in the country. In the same year, they, together with eight other manufacturers licensed under the Jauch patent, produced and sold all of the computer pumps sold in the United States. (No. 81, R. 10; No. 82, R. 9.)

Veeder, since 1938, has been the sole manufacturer of computing mechanisms in this country (No. 81, R. 10; No. 82, R. 9), although prior to that time Neptune Meter Company (Neptune) manufactured and sold computing mechanisms to manufacturers of computer pumps who were in competition with Wayne, G & B, and Tokheim. Likewise, prior to 1938 other computer pump manufacturers produced computing mechanisms for use in their pumps, which were sold in competition with computer pumps made by Wayne, G & B, and Tokheim. (No. 81, R. 9-10; No. 82, R. 8-9.)

All of the appellee manufacturers sell their products in interstate commerce. Also, the other manufacturers licensed under the Jauch patent sell their computer pumps to purchasers outside the state of manufacture. Prior to 1938, when it was in the business, Neptune sold its computing mechanisms in interstate commerce. (No. 81, R. 9-10; No. 82, R. 8-9.)

Upon the inducements summarized, the indictments make specific charges, which are in many respects the same. We shall, therefore, detail the charges in the price-fixing case (No. 81) and then point out those respects in which the monopoly charges (No. 82) differ.

A. The price-fixing indictment.—This indictment charges that continuously since 1932 the defendants have “engaged in a combination and conspiracy to fix, maintain, and control arbitrary, artificial, and noncompetitive prices for the sale of computer pumps” (R. 10-11). The indictment then describes a conspiracy to regulate the entire industry from manufacturer to consumer, using as a device to accomplish that purpose the Jauch patent. The specific allegations (R. 11-13) may be summarized in three groups:

The use of the Jauch patent to dominate the industry and to suppress manufacture under competing patents.—The appellees Wayne, G & B, Tokheim, and Veeder agreed to give Wayne’s Jauch patent a dominating position in their

operations. Wayne was to license G & B and Tokheim to make, use, and sell computer pumps, while they were to submit to the determination of Wayne the use of all patents owned or controlled by them and to acknowledge the validity of the Jauch patent. Likewise, Veeder was to convey to Wayne all of its patents on computing mechanisms and parts thereof, and to acknowledge the validity of the Jauch patent. Veeder was to manufacture computing mechanisms and sell them only to Wayne, G & B, and Tokheim, and purchasers approved by them. In return, Wayne, G & B, and Tokheim agreed to purchase computing mechanisms only from Veeder.

All competitors outside the conspiracy were also to be brought under the control of the Jauch patent. Thus, Wayne was to acquire ownership or control of all competing patents on both computer pumps and computing mechanisms. Veeder was to assist by acquiring and conveying to Wayne competing patents on computing mechanisms. Wayne, with the consent of G & B and Tokheim, was to induce all other manufacturers of computer pumps to accept licenses under the Jauch patent upon terms securing to Wayne control of the licensees' patents on computer pumps and computing mechanisms; also, Wayne was to require all such new licensees to accept substitute licenses on terms protecting the validity of the Jauch patent in perpetuity.

Wayne was to license no one, however, except with the consent of G & B and Tokheim and upon terms authorized by them. Wayne also was to compel Neptune, the sole competitor of Veeder in the sale of computing mechanisms, to acknowledge forever the validity of the Jauch patent, to submit all patents owned or thereafter acquired by it to uses determined by Wayne, to refrain from manufacturing computing mechanisms except with the approval of Wayne, and to refrain from selling except to customers approved by Wayne, G & B, and Tokheim. In addition, Wayne was to cause the owners of all patents declared to be in interference with the Jauch patent to file concessions of priority in the Patent Office.

The use of the Jauch patent to fix manufacturers' prices.—In addition to the general charge of a conspiracy "to fix * * * arbitrary, artificial, and noncompetitive prices", the indictment charges specifically that it was agreed that Wayne, G & B and Tokheim would devise a formula for determining prices for the sale of computer pumps, on the basis of which Wayne would determine and announce the prices together with other terms and conditions of sale (including commissions and discounts) fixed by agreement. Wayne, as well as G & B and Tokheim, agreed to adhere to the prices, discounts, terms and conditions thus announced.

The prices of all other² manufacturers were to be controlled by including in the licenses to be issued by Wayne (see p. 8, *supra*) provisions securing to Wayne, G & B and Tokheim control of the licensees' prices.

The agreement to fix jobbers' resale prices.—

The indictment further alleges that Wayne, G & B, and Tokheim agreed upon jobbers' resale prices, and agreed to boycott jobbers who did not adhere to such prices and to eliminate all jobber discounts in the event of a general refusal to adhere to such prices (R. 12).

The defendant Association was to assist in enforcing both the manufacturers' selling prices and the jobbers' resale prices by instructing sales managers and salesmen of Wayne, G & B, and Tokheim, and of other manufacturers licensed by Wayne, to adhere to the agreed prices, discounts, and terms of sale, and by urging jobbers to adhere to the agreed resale prices (R. 13).

The indictment also contains a number of other specific charges which, although significant, are not essential to the questions presented upon this appeal and therefore need not be detailed here.²

² One important group of allegations not included in the above summary concerns the attempt of the appellees to prevent the conversion of non-computer pumps into computer pumps. It is alleged that the appellees agreed to refrain from using computing mechanisms to convert non-computer pumps into computer pumps, to refuse to sell computing mechanisms for such use, and to restrict and discourage the sale of non-computer pumps. (R. 12.) In setting forth

Following the charges, the price-fixing indictment alleges that the objects of the conspiracy have been accomplished and mentions among others the following results (R. 13): the appellees have secured ownership or control of all patents on computing mechanisms and computer pumps; they have secured control of all manufacturing sources of computing mechanisms, and have restricted the manufacture of such mechanisms to Veeder; they have restricted the manufacture of computer pumps to Wayne and its licensees; they have prevented the use of computing mechanisms

the acts done pursuant to the conspiracy it is alleged that John Wood Manufacturing Company, Inc., was induced to accept a license under the Jauch patent, which was substantially similar to licenses issued to other manufacturers at about the same time, one of the terms of which required them to refrain from using computing mechanisms to convert non-computer pumps into computer pumps (R. 14).

Another important group of allegations shows the purpose of the appellees to exploit the Jauch patent for their joint benefit. It is alleged that Wayne, G & B and Tokheim were to divide royalty payments made by other licensees and to share litigation expenses; that Wayne was to charge each of the other licensees with violations of its license; and that under threat of cancellation the other licensees were to be compelled to accept new licenses securing to appellees "control of the ownership and official personnel of the licensee". (R. 13.)

Most of the other allegations not summarized in the text deal with minor details in furtherance of the conspiracy. For example, it is alleged that the appellees agreed that Wayne would secure for itself and its licensees special rights under patents on devices pertaining to the operation of computer pumps which are required by State Sealers or Fire Underwriters (R. 11).

to convert non-computer pumps into computer pumps; they have eliminated discounts to jobbers, thereby driving jobbers from the business of buying and selling computer pumps; and they have fixed arbitrary and non-competitive prices for the sale of computer pumps (R. 16-17).

B. *The monopoly indictment.*—Count one of the monopoly indictment charges that continuously since 1932 the defendants have “engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of *computer pumps* in * * * interstate trade and commerce”^{*} (R. 9). The details of the charge are the same as those set forth in the price-fixing indictment, except that the allegations concerning price fixing are omitted. Likewise, the alleged results of the conspiracy are the same as those described in the price-fixing case, with the same exception.

Count two of the monopoly indictment charges that continuously since 1932 the defendants have “engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of *computing mechanisms* * * * in interstate trade and commerce”^{*} (R. 15-16). The allegations setting forth the terms and results of the conspiracy are substantially the same as those in count one.

^{*} Italics added.

^{*} Italics added.

2. OPINION AND ORDERS OF THE COURT BELOW

The appellees filed demurrers to the indictments (No. 81, R. 19-26; No. 82, R. 21-28). On February 24, 1942, the court below filed an opinion (R. 33-43), and on the same day orders were entered sustaining the demurrers (No. 81, R. 43; No. 82, R. 45). The ground of the decision is in dispute. The Government contends that it appears from the opinion that the decision is based upon a construction of the Sherman Act, and has taken direct appeals to this Court. The appellees in their Statement Opposing Jurisdiction argue that the sole basis of the decision is that the indictments are so indefinite as to be fatally deficient under the Sixth Amendment, or, in the alternative, that this alleged fault is one independent ground of the decision. This Court, on May 25, 1942, postponed further consideration of the question of jurisdiction to the hearing on the merits (No. 81, R. 48; No. 82, R. 50)..

SPECIFICATION OF ERRORS TO BE URGED

The district court erred in each case:

1. In sustaining the several demurrers interposed to the indictment (Assignments of Error No. 1 in No. 81, R. 44; and No. 1 in No. 82, R. 46).

2. In holding that the objectives of the conspiracies alleged in the indictments are ones which

a patentee and those combining with him may lawfully entertain and use under the patent laws, and therefore do not constitute violations of the Sherman Act (Assignments of Error No. 2 in No. 81, R. 44; and No. 2 in No. 82, R. 47).

3. In holding that the means set out for effectuating the objectives charged in the indictments are means which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore do not constitute violations of the Sherman Act (Assignments of Errors No. 2 in No. 81, R. 44; and No. 2 in No. 82, R. 47).

4. In holding that the objectives of the conspiracies alleged in the indictments together with the means alleged in the indictments for effecting those objectives are aims and means which a patentee and those combining with him may lawfully entertain and use under the patent laws, and therefore do not constitute violations of the Sherman Act (Assignments of Error No. 2 in No. 81, R. 44-45; and No. 2 in No. 82, R. 47).

SUMMARY OF ARGUMENT

I

Under the Criminal Appeals Act this Court has jurisdiction of a direct appeal from a decision sustaining a demurrer to an indictment when such decision "is based upon the * * * construction of the statute upon which the indictment is founded." In the instant case the district court

held that the charges made in the indictments did not constitute violations of the Sherman Act, and then went on to say that the indictments did not charge with sufficient definiteness acts which the court considered would be violations of the Sherman Act. The decisions, therefore are appealable to this Court. The reason there is no jurisdiction when the judgment of the district court rests upon some independent ground other than its interpretation of the statute is that for the Court to construe the statute in such case would be for it to render an advisory opinion upon an abstract question, since it cannot examine the independent ground and therefore must in any event affirm the judgment. But this reason is inapplicable here. The district court held that the indictments as a matter of substance do not charge crimes within the meaning of the Sherman Act as construed by the court, and simply continued on to say that if the indictments were intended to charge crimes within the meaning of the Act as construed by the court, then they are defective as pleadings. Consequently the orders of the district court cannot stand upon the second ground alone; its orders necessarily are "based upon" its construction of the Sherman Act and under the Criminal Appeals Act direct appeals will lie.

There is also a broader ground upon which the jurisdiction of this Court to decide the substantive questions may be rested. The principles de-

termining the jurisdiction of this Court under the Criminal Appeals Act. have been developed by analogy to appeals from state court judgments. In such cases this Court will decide the federal question if the non-federal grounds put forward are without any fair or substantial support. We submit that the analogy is apposite here. The suggestion that both indictments are void for indefiniteness is utterly lacking in merit. Regardless of the grounds of the decision below, therefore, this Court has jurisdiction to determine whether the indictments charge conduct which violates the Sherman Act.

II

The price-fixing indictment.—The indictment in No. 81 alleges that the purpose and effect of the combination have been to fix arbitrary and non-competitive prices for the sale of computer pumps. This was not accomplished by legitimate use of the Jauch patent. It was accomplished by combination: by an agreement among dominant manufacturers to grant to Wayne control of their patents and to manufacture and sell under Wayne's Jauch patent at prices fixed by mutual agreement; by inducing other manufacturers to accept licenses under the Jauch patent upon terms securing to Wayne control of their patents and to the three dominant manufacturers control of their prices; by agreement with appellee Veeder that

Veeder should sell the computing mechanisms necessary to computer pumps only to approved manufacturers; by compelling Neptune, Veeder's sole competitor in the manufacture and sale of computing mechanisms, to surrender control of its patents and to manufacture and sell only to the extent allowed by the conspirators; and by a boycott of any jobber who refused to adhere to resale prices fixed by the conspirators. Such a combination is unlawful *per se* under the decisions in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, and *United States v. Masonite Corp.*, 316 U. S. 265, because it actually or potentially suppresses competing and non-infringing products not as a result of the preference of the public for the patented product but as a result of the preference of the manufacturers for a non-competitive market.

The combination charged in the price-fixing indictment violates the Sherman Act for three additional reasons. First, there has been pooling and suppression of patents for the purpose of eliminating price competition. *Standard Oil Co. v. United States*, 283 U. S. 163. Second, the patentee has bound itself to adhere to prices fixed according to a formula agreed upon with competitors and has conspired with certain licensees to protect them from competition by inducing

other competing manufacturers to take licenses upon terms securing to the conspirators control of the licensees' prices, thus unlawfully restraining trade in the patented product for the benefit of competitors. *Interstate Circuit v. United States*, 306 U. S. 208. Third, the appellees have unlawfully agreed to fix resale prices and to compel adherence by means of a boycott. *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600.

The monopoly indictment.—The conduct charged in the indictment in No. 82 is the same as that described by the price-fixing indictment except that the allegations of price fixing are omitted. Manifestly, monopolies secured by the described means are unlawful under Section 2 of the Sherman Act unless they are within the scope of the Jauch patent. Here, the appellees have gone beyond legitimate exploitation of the patent monopoly for three reasons. First, a patentee goes beyond his monopoly when he enhances his trade position by a horizontal combination with potential competitors under which they market only the patented article and thereby add to the monopoly of the patented article the advantages of impairing and eliminating actual or potential competition in competing but non-infringing devices. Second, an agreement among competitors to combine patents for the purpose of creating a monopoly is within the prohibition of the Sherman Act. Third, whatever monopoly the issue of a patent

may confer upon the patentee, he may not lawfully restrain trade to enable other manufacturers to achieve a monopoly position.

None of the other patents in the field (except one) had been held to conflict with or infringe the Jauch patent, and it cannot be assumed, in the absence of an adjudication, that the Jauch patent is any more valid than the others or that non-infringing devices satisfying the public demand cannot be developed under the incentive of competition.

ARGUMENT

I

THE COURT HAS JURISDICTION OF THESE APPEALS UNDER THE CRIMINAL APPEALS ACT

On these appeals we invoke the jurisdiction of the Court under the Criminal Appeals Act,⁵ which permits the United States to appeal directly to this Court from a judgment of a district court sustaining a demurrer to an indictment where such decision "is based upon the * * * construction of the statute upon which the indictment * * * is founded." In our view the court below, construing the Sherman Act in relation to the patent laws, first held as a matter of substance that the indictments do not charge a crime within the meaning of the Sherman Act, and then simply

⁵ 18 U. S. C. 682, Judicial Code § 238, 28 U. S. C. 345. The relevant provisions are set out in full, pp. 3-4, *supra*.

went on to say that the indictments are defective as pleadings if they are intended to charge crimes within the Sherman Act as that Act is construed by the court below. We submit that two principles show that such a decision "is based upon" a construction of the Sherman Act, upon which the present indictments were founded. It follows that this Court has jurisdiction in the instant cases.

First. When a district court decides that an indictment does not charge an offense under the Sherman Act, an appeal will lie even though the district court interpreted the Sherman Act in the light of other statutes. *United States v. Borden Co.*, 308 U. S. 188, 194-195. In the instant case, therefore, it is immaterial that the district court considered that the acts charged were removed from the reach of the Sherman Act by the patent laws. Indeed, the appellees do not oppose jurisdiction on any such ground.

Second. Even though the district court may point out other faults in the indictment, a direct appeal will lie whenever the decision "is based upon" the interpretation of a statute and does not stand independently upon the other faults mentioned by the district court. The reason there is no jurisdiction when the judgment of the district court rests upon some *independent* ground not subject to review is that for the Court to construe the statute in such a case would be for it

to render an advisory opinion upon an abstract question, since it must in any event affirm the judgment. *United States v. Hastings*, 296 U. S. 188, 192-194. But this reason is inapplicable when, as here, the district court has held that an indictment as a matter of substance does not charge a crime within the meaning of a statute as construed by the court, and merely continues on to say that if the indictment is intended to charge a crime within the meaning of the statute as construed by the court, then it is defective as a pleading for want of specificity. In such a case the order of the district court cannot stand upon the second ground alone and must be reversed if that court's construction of the statute was erroneous. In such a case, therefore, the order necessarily "is based upon" a construction of the statute, and under the Criminal Appeals Act a direct appeal will lie.

Any other view would defeat the purpose of the Criminal Appeals Act. Every decision sustaining a demurrer to an indictment for failure to charge a crime within the meaning of the statute can be said in a loose sense to rest in part upon the additional conclusion that the indictment is a defective pleading if it is intended to make other charges which do constitute a crime. This additional conclusion may be left unsaid because no one has urged the contrary. Or, even though it is unnecessary, the judge may mention it be-

cause the defendants framed their pleadings and arguments in terms of a failure to plead with sufficient definiteness acts which they urged were essential elements of the crime. But this form of argument cannot hide the fundamental question whether the acts which are definitely charged in the indictment do in fact constitute a crime; and therefore, even when the court expresses the additional step in the reasoning in its opinion, it remains true that the first step is the essential one in the decision.

We submit, therefore, that it is plain that the Court has jurisdiction of these appeals. But if further support is needed it is provided by the analogy to decisions sustaining the jurisdiction of this Court upon appeals from state courts where it was contended that the decision rested upon a non-federal ground. The Court has repeatedly held (*Enterprise Irrig. Dist. v. Canal Co.*, 243 U. S. 157, 164):

* * * where the non-federal ground is so interwoven with the other as not to be an independent matter, *or is not of sufficient breadth to sustain the judgment without any decision of the other*, our jurisdiction is plain. * * * [Italics added.]

See also *Abie State Bank v. Bryan*, 282 U. S. 765, 773; *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 682; cf. *Fox Film Corp. v. Muller*, 296 U. S. 207. The analogy is unusually persuasive in interpreting the Criminal Appeals Act because that statute was enacted in the light of those considera-

tions governing the exercise of judicial power which are exemplified by the decisions cited above. *United States v. Hastings*, 296 U. S. 188, 193-194.

In the instant case the appellees have opposed this Court's jurisdiction with the argument that the decision below rests exclusively, or if not exclusively then independently, upon the ground that the indictments are too indefinite to apprise them of the nature and cause of the accusations against them. As stated above, we read the opinion differently. In our view, the district judge accepted the clear and specific allegations of the indictments and held that they did not charge violations of the Sherman Act because the acts charged were within the scope of the patent monopoly; he then went on to say in several instances that, if the indictments were intended to charge acts outside what he considered to be the patent privilege, they did not do so with sufficient specificity. If our view is correct, the order plainly is based upon the first step in this reasoning and cannot stand unless the judge correctly determined the scope of the patent monopoly in relation to the Sherman Act, thus raising an appealable question. We shall show below, therefore, that we interpret the court's action correctly both insofar as it dealt with the indictments as a whole and as it dealt with the groups of subsidiary charges.

The indictments as a whole.—As set forth in our Statement, *supra*, the indictments charge conspiracies to regulate the computer pump industry

from manufacturer to consumer, and to monopolize commerce in computer pumps and computing mechanisms under the aegis of the Jauch patent, not by legitimate exploitation of a dominating patent⁶ but by combination under agreements among former and potential competitors binding them, *inter alia*: (a) to cease competition and accept licenses under the Jauch patent, to pool and suppress competing patents, and to induce other manufacturers to do likewise; (b) to use the Jauch patent to fix manufacturers' prices, including commissions and discounts; and (c) to fix jobbers' resale prices and boycott non-complying jobbers.

In the district court, as in this Court, the Government argued that taken as a whole these allegations charged conspiracies to fix prices and monopolize trade which went far beyond the scope

⁶ The indictments contain allegations proof of which would show that the appellees never looked upon the Jauch patent as dominating the field but used it simply as an attempted excuse for their price fixing and monopolistic purposes. For example, it is alleged that Wayne offered to sell the patent to Neptune if Neptune would administer the licenses thereunder on terms, including price control, established by Wayne (R. 15). The indictments also set forth that Tokheim recognized that the Jauch patent made "doubtful claims" (R. 14) but agreed to "a licensing arrangement to other companies only under terms that will admit of price control * * *" (R. 13). And the allegation that Wayne, G & B and Tokheim agreed to divide royalties and litigation expenses (R. 13) also shows that this is not a case of one company dominating the field by the strength of its patent position.

of the patent monopoly and were plainly violative of the Sherman Act. It referred particularly to *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, as a controlling precedent showing that the Jauch patent was not a sufficient justification for the otherwise admittedly unlawful combinations.⁷

The district court rejected the Government's argument not on the ground that the pleading was defective but on the ground that the argument was unsound. Preparatory to discussing the allegations of the indictments the court stated its view of the scope of the patent monopoly to be that a patentee has power to fix prices and grant licenses upon any terms he may choose (R. 34-36).⁸ It then cited *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7), certiorari granted, 207 U. S. 589, dismissed per stipulation, 210 U. S. 439 to show that whatever the patentee could do alone, he could do with others in combination.⁹ Finally, the court dis-

⁷ See e. g. *United States v. Trenton Potter Co.*, 273 U. S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 465-468.

⁸ The cases relied upon by the District Court were *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405; *Bement v. National Harrow Co.*, 186 U. S. 70; *United States v. General Electric Co.*, 272 U. S. 476; *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7), certiorari granted, 207 U. S. 589, dismissed per stipulation, 210 U. S. 439.

⁹ The *Rubber Tire* case has been substantially repudiated by the court which decided it. See *American Equipment Co.*

tinguished the *Standard Sanitary* case on the ground that it involved a process and not a product patent, and held that the only limitation upon the power of a patentee, acting alone or in combination with others, is that "he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of tying clauses" (R. 37).

This interpretation of the Sherman Act brought the court to the focal point of the case; it then ruled (R. 37-38):

The things and means * * * set out are things which I believe the patentee, under its patent already had the right to do.

And, after discussing a number of the specific charges (see pp. 28-35, *infra*), the court concluded (R. 42):

I have read the indictments in their entirety several times, and in the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do. The

v. Tuthill Bldg. Material Co., 69 F. (2d) 406, 409 (C. C. A. 7). Likewise, it is in direct conflict with later decisions of this Court. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *Interstate Circuit v. United States*, 306 U. S. 208; *United States v. Masonite Corp.*, 316 U. S. 263.

fixing of prices and monopoly to manufacture and sell computer pumps, here complained of, were the very rights which the Wayne Company and its licensees enjoyed by reason of ownership of the patent. * * *

*Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test [of certainty]. * * * [Italics added.]*

We submit, therefore, that there can be no doubt that the decision is based upon a construction of the Sherman Act in relation to the patent laws. The structure of the whole opinion makes it apparent that the district court decided that "the things and means * * * set out are things which I believe the patentee * * * had the right to do" and that the court simply went on to say—"having in mind that the subject matter * * * is protected by a patent"—that if any other charges were intended, they were not set out with sufficient definiteness and certainty.¹⁰

¹⁰ That the language in the opinion on definiteness goes only to the possibility that the indictments were intended to charge other acts in addition to those held by the judge to be within the patent monopoly is shown clearly by the following quotation (R. 38) upon which the appellees relied in their Statement Opposing Jurisdiction (p. 11):

The difficulty is that the Government fails to set out any identifying facts to show that the Wayne Pump Company and its licensees did *anything more than the law*

Use of licenses and pooling and suppression of patents in order to fix prices and monopolize trade.—One of the principal groups of allegations in the indictments charges that with the purpose and effect of fixing prices (No. 81) and monopolizing trade (No. 82) the appellees agreed that G & B and Tokheim would acknowledge the validity of and accept licenses under Wayne's Jauch patent and surrender control of their patents to Wayne. Other manufacturers likewise were to be induced to accept such licenses upon terms acknowledging the validity of the Jauch patent and securing to Wayne control of the licensees' patents. Also, Wayne would compel Neptune, Veeder's only competitor, to submit its patents to uses determined by Wayne and to acknowledge the validity of the Jauch patent, to refrain from manufacturing computing mechanisms except with the approval of Wayne, and to sell computing mechanisms only to customers

permitted them to do under the monopoly granted by the patent. How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments. [Italics added.]

This statement follows immediately after the holding that "the things and means * * * set out are things which I believe the patentee, under its patent already had the right to do". The sequence is convincing that the discussion of the alleged indefiniteness is only supplemental to the issue whether the patentee had a right to do the things set out in the indictment.

approved by Wayne, G & B and Tokheim. A number of decisions appeared to show that such licensing and pooling and suppression of patents for the purpose of fixing prices or achieving a monopoly is a plain violation of the Sherman Act. (See pp. 45-48 *infra*.) The district court, however, rejected this interpretation of the Act and took the view that the conduct was lawful because the Jauch patent dominated the field. The court said (R. 38):

it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps "to uses determined by Wayne".

The court then explained that it was not clear that any crime was charged by this allegation because "with the issuing of the Jauch patent the Wayne Company dominated the computer pump field" (R. 38) and in support of that conclusion it referred to the decision of Judge Slick in the Neptune litigation holding the Jauch patent valid and infringed. The court then made it apparent that its holding in this regard was an interpretation of the Sherman Act, saying (R. 39-40):

Under these conditions I fail to see how defendants aided in carrying out an unlawful conspiracy because defendant Wayne Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers, who had purchased computer mechanisms from Neptune and other man-

ufacturers, and attempted to induce them to accept licenses under the Jauch patent. * * *

The indictment also charges as one of the means or devices used in bringing about the combination or conspiracy that "the defendants Veeder, G. & B. and Tokheim acknowledge the validity of the Jauch patent." When G. & B. became licensees they were estopped from denying the validity of their licensor's patent, and I see nothing illegal or unlawful in the licensor requiring of them that they acknowledge the validity thereof, especially, as here, where its validity had already been established by the United States District Court of Indiana. * * *

As the appellees point out, the court also said that if improper means were used either in securing the acknowledgments of the validity of the Jauch patent (R. 39-40) or in persuading manufacturers to accept licenses, such means should have been charged (R. 39). But plainly those remarks, which are three of the ten passages relied on by the appellees,¹¹ do not constitute a wholly

¹¹ The three passages are quoted at pages 10-11 of the Statement Opposing Jurisdiction. It was also in this connection that the court commented upon the failure of the indictment to list the patents competing with the Jauch patent (R. 41). It is apparent from the context out of which the appellees have excerpted this comment (R. 42) that the court did not hold the indictments invalid on this ground, which could easily be remedied by a motion for a bill of particulars if the appellees need such information to prepare their defense.

independent ground on which the orders sustaining the demurrers will rest. On the Government's view of the cases the presence or absence of such misconduct was immaterial. Those remarks, therefore, are plainly intended merely to supplement the court's ruling on the scope of the patent monopoly by pointing out that the indictments do not charge the kind of conduct which it considered a violation of the Sherman Act.

*Use of the Jauch patent to fix manufacturers' prices.*¹²—The manner in which the court dealt with these subsidiary charges also shows that we interpret his ruling correctly. The price-fixing indictment charges that Wayne, G & B, and Tokheim agreed upon a formula for determining the prices for computer pumps to which all three were to adhere, and that they also fixed and adhered to other terms and conditions of sale, including discounts and salesmen's commissions. Likewise, other manufacturers were to be made to adhere to prices determined by Wayne, G & B and Tokheim through a series of license agreements securing to them control of the licensees' prices. The Government argued that these agreements were in violation of the Sherman Act under well-settled principles. (See pp. 38-50 *infra*.) The district court held, however (R. 37):

¹² The allegations concerning fixing of manufacturers' prices appear only in the price-fixing indictment. The monopoly indictment, therefore, was not subject to attack on the ground that these allegations are too indefinite.

There is no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. * * *

Plainly, this was a ruling that the specific allegations did not as a matter of substance charge a crime. A few sentences later the court observed (R. 37):

What is meant by the phrase "used the Jauch patent" is not quite clear. * * * if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments.

But this observation does not suggest that the charges made are void for uncertainty; it simply points out that nothing more is charged than what the court holds to be protected by the patent monopoly, thus emphasizing again that the basis of the decision is the ruling upon the scope of the patent monopoly in relation to the Sherman Act.

Agreement to fix jobbers' resale prices.—The price-fixing indictment¹³ charges that the ap-

¹³ The allegations concerning fixing of resale prices appear only in the price-fixing indictment. The monopoly indictment, therefore, was not subject to attack on the ground that these allegations are too indefinite.

pellees agreed (R. 12):

that the said defendants determine jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices * * *

In considering these allegations the court declared (R. 40):

no facts are set out to show that the Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computing pumps was determined. * * *

And further the court said (R. 41):

If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged.

In their Statement Opposing Jurisdiction (p. 11) appellees place great weight on these two excerpts. We submit, however, that like its other subsidiary rulings the court's disposition of the resale price-fixing aspect of the conspiracy rests basically upon a misconstruction of the Sherman Act.

It seems obvious that the quoted allegations were clear as far as they went. They charge an agreement among the appellee manufacturers upon resale prices and a further agreement to boycott jobbers who do not adhere to those prices. They raise the issue whether the joint action of manufacturers in fixing resale prices, the joint refusal of manufacturers to deal with price-cutting jobbers, and the joint elimination by manufacturers of jobbers' discounts is an unlawful restraint of trade under the Sherman Act, when it is part of a horizontal agreement among the manufacturers to eliminate all price competition by fixing both manufacturers' selling prices and jobbers' resale prices. The district court apparently believed, however, that to charge a violation of the Sherman Act it was necessary to allege that there were negotiations and actual agreements with the jobbers fixing the resale prices. It could only have been on this assumption that the district court stated that the indictment should have alleged actual agreements with the jobbers and named the specific jobbers who were parties to the arrangement.

The holding of the district court, therefore, is not simply that the resale price-fixing allegations of the indictment were too general. The holding is that the price-fixing and boycott agreement charged is not itself unlawful. It is true that the court nowhere says this expressly, but the de-

cision in this respect must be based either upon that unexpressed conclusion, or else upon the failure of the court to consider whether the Sherman Act condemns such an agreement to fix resale prices and to boycott non-complying jobbers. In either event, the ruling is based upon a construction of the Sherman Act and an appeal will lie, for a failure to consider the application of the Act is itself a construction of the Act. *United States v. Nixon*, 235 U. S. 231; *United States v. Malphurs*, 316 U. S. 1.

In their Statement Opposing Jurisdiction appellees have listed a number of points in the opinion at which the district judge referred to a lack of specificity in the allegations. We have dealt with all but one of these passages above¹⁴ and have shown, we submit, that at the most they go no farther than to say that the indictments do not charge with sufficient definiteness anything which the district court considered to be a violation of the Sherman Act. The other passage, with which we have not heretofore dealt, in its context is as follows (R. 37-38):

In the case of *United States v. Standard Sanitary Manufacturing Co.*, 226 U. S. 20, the patent owner and its licensees entered into a scheme for fixing prices on a common article of commerce—unpatented bath tubs—and then by a pretended use of a process patent attempted to evade the Sherman

¹⁴ See pp. 27, 29, 30, 32, 33-34, *supra*.

Act. This is obviously not the instant case, and the indictments do not allege that there was any understanding or agreement among the defendants to use the patent to fix prices on any unpatented article. In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they "knowingly have entered into and engaged in a combination and conspiracy to fix and maintain noncompetitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out." The things and means then set out are things which I believe the patentee, under its patent already, had the right to do.

We set this quotation out at length because merely to read the next to the last sentence in its context shows how utterly it fails to support the appellees' contention (Statement Opposing Jurisdiction, pp. 12-13) that the district court decided the case on the ground that no conspiracy was charged in the indictments. On the contrary, this passage illustrates again the reasoning of the district court on all the issues: the court held that the acts charged were lawful and simply said that "aside from" those allegations no misconduct was alleged.

We submit, therefore, that the decision below was bottomed on an interpretation of the Sherman Act. If the district court construed it erroneously, the orders sustaining the demurrers cannot stand.

This would be admitted, we think, if the judge had expressly stated at the outset what acts he considered to have been specifically charged by the indictments, and what charges he could not consider to have been made, and if he had then held that the acts charged did not constitute a crime. The fact that he reversed the sequence of thought and decided, first, whether the specific charges were unlawful and, second, whether anything more was charged, should not be allowed to conceal the essential character of the ruling. The decision "is based upon" an interpretation of the Sherman Act and, therefore, under the two principles stated at the outset an appeal will lie.

There is a broader ground, moreover, upon which the jurisdiction of this Court to decide the substantive question will rest. The principles determining the jurisdiction of this Court under the Criminal Appeals Act have been developed by analogy to cases arising on writs of error or appeals from judgments of state courts. *United States v. Hastings*, 296 U. S. 188, 193-194. In such cases this Court will decide the federal question if the non-federal grounds put forward are without any fair or substantial support. *Ward v. Love County*, 253 U. S. 17, 22. *Lawrence v. State Tax Comm.*, 286 U. S. 276, 282-283; *Utley v. St. Petersburg*, 292 U. S. 106, 112; *Fox Film Corp. v. Muller*, 296 U. S. 207, 209. We submit that the analogy is apposite here. No argument

is needed to show that the indictments fairly apprise the appellees of the nature and cause of the charges against them; the conspiracies are described with unusual specificity and detail; the suggestion that both indictments are void in their entirety for indefiniteness is utterly lacking in merit. Regardless of the grounds of the decision below, therefore, this Court has jurisdiction to determine whether the indictments charge violations of the Sherman Act.

II

THE COMBINATIONS AND CONSPIRACIES CHARGED IN THE INDICTMENTS ARE UNLAWFUL UNDER THE SHERMAN ACT

A. THE PRICE-FIXING INDICTMENT

As we have shown in our Statement, pages 4-12, *supra*, the price-fixing indictment charges a combination among the dominant manufacturers in an industry to use a patent as the fulcrum of a series of arrangements, both among themselves and with others, in order to eliminate all price competition in the sale of computer pumps. Competition between Wayne, G & B and Tokheim was to be eliminated by G & B and Tokheim turning over their patents to Wayne, acknowledging the validity of the Jauch patent, accepting licenses thereunder, and agreeing with Wayne upon selling prices. Competition between those three and all

other manufacturers of computer pumps was to be prevented by obtaining control of all other patents on such pumps and by inducing all other manufacturers in the field to accept licenses under the Jauch patent upon terms acknowledging its validity and securing to Wayne control of the licensees' patents and to Wayne, G & B and Tokheim control of the licensees' prices. The appellee Veeder was to assist by turning over to Wayne patents owned or acquired by it on computing mechanisms and by selling computing mechanisms only to purchasers approved by Wayne, G & B and Tokheim who, in return, were to purchase computing mechanisms only from Veeder. Neptune, Veeder's sole competitor in the manufacture and sale of computing mechanisms, was to be compelled to accept a license under the Jauch patent, to surrender control of its patents, to manufacture computing mechanisms only with the approval of Wayne, and to sell such mechanisms only to purchasers approved by Wayne, G & B and Tokheim. Even competition among jobbers was to be eliminated by fixing jobbers' resale prices, boycotting non-complying jobbers, and eliminating jobbers' discounts in the event of a general failure to adhere to the resale prices. The Jauch patent was not dominating either because its basic character had been established by litigation or because the public insisted upon pumps made under it; it was the facade of the combination. (See pp. 7-10, *supra*.)

The objective to eliminate all price competition in the sale of computer pumps was accomplished. All patents capable of competing with the Jauch patent were brought under the control of the conspirators; the validity of that patent was acknowledged by all manufacturers in the field; and all manufacturers were licensed thereunder. The appellees by agreement controlled not only their own prices but also the prices of all other manufacturers. And they sought to control jobbers' prices until 1938 when, by agreement, they stopped all manufacturers from giving discounts to jobbers with the result that jobbers no longer share in the distribution of computer pumps. (See pp. 11-12, *supra*.)

We submit that this conspiracy "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it" and "passed to the purpose and accomplished a restraint of trade condemned by the Sherman law" as clearly as did the combination held unlawful by this Court in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48. In that case, manufacturers of 85 percent of the enameled iron ware sold in the United States, who had formerly been competitors, accepted licenses under a patent for an improved method of enameling iron ware. The licensor (who was not a manufacturer, but the promoter of the scheme) had also acquired control of the competing patents. He and five

representatives elected by the manufacturer licensees fixed prices to which all the licensees adhered. Jobbers' resale prices also were fixed, and the members of the combination were to boycott jobbers who would not execute resale price agreements. This Court held that the combination was not protected by the patent privilege and violated the Sherman Act.

The single feature distinguishing that case from the instant case, except as this is more extreme, is that there a process patent was involved while the Jauch patent covers a product. The court below found the case inapplicable for this reason, but obviously it was in error. For this Court expressly stated in the *Standard Sanitary* case (p. 49) that it reached its decision "without entering into the consideration of the distinction * * * between a patented article and a patented tool used in the manufacture of an unpatented article."

The district court also intimated that the *Standard Sanitary* case was distinguishable because it involved a deliberate, preconceived attempt to evade the Sherman Act (R. 37). But assuming that characterization of the *Standard Sanitary* case to be accurate, nevertheless the case is strictly in point. In the instant case the indictment in its entirety is based on the theory of a conspiracy to eliminate competition, with the Jauch patent being used simply as a means subservient to that end.

In addition to the general charge of a conspiracy to fix prices, the indictment alleges that the appellees agreed to "use the Jauch patent . . . for the purpose of fixing prices" (R. 11), thereby specifically charging that appellees had the pre-conceived intention to use the patent to accomplish a purpose forbidden by law. The indictment contains other specific allegations showing this to be true. It is alleged, for example, that Wayne with the consent of G & B and Tokheim offered Neptune a license in 1935 upon condition that Neptune turn over its patents to uses determined by Wayne, and that when this offer was rejected Wayne offered to transfer the Jauch patent to Neptune upon condition that Neptune administer the price-fixing arrangement (R. 14-15). The indictment also charges that Wayne agreed to share royalties and litigation expenses with G & B and Tokheim (R. 13). Neither the making of this agreement nor the negotiations with Neptune is the conduct of a manufacturer dominating the field by the strength of his patent position. Both show, if such proof be necessary, that the combination treated the Jauch patent as a device to circumvent the positive prohibitions of the Sherman Act.

But whatever the rationale of the *Standard Sanitary* case, it is now clear that a combination such as that charged in the present indictment is *per se* a violation of the Sherman Act, regardless of whether the combination was deliberately

devised for unlawful purposes. *United States v. Masonite Corp.*, 316 U. S. 265. The basic wrong to the public is that competing manufacturers, unwilling to risk price competition, have by common consent taken shelter, and induced others to take shelter, under a patent. Mr. Justice Douglas, speaking for the Court in *United States v. Masonite Corp.*, 316 U. S. 265, 281, explained the reasons as follows:

The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition.

* * * Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. The presence of competing patents serves merely to accentuate that tendency and to underline the potency of the forces at work. Control over prices thus becomes an actual or potential brake on competition. This kind of marketing device thus, actually or potentially, throttles or suppresses competing and non-infringing products and tends to place a premium on the abandonment of competition. It is outside our competence to inquire whether the

result was or was not *beneficent*, or whether the evil was or was not realized. * * *

The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*. * * *

The superficial difference that licenses to vend were involved in the *Masonite* case, whereas here the licenses are to manufacture, use and sell, will not serve as a distinction. The purposes and results of the conspiracy charged are the same as those denounced in the *Masonite* case. The appellees and all manufacturers licensed under the Jauch patent have been competitors, and would be now but for the conspiracy. All competing patents have been subjected to the control of Wayne, and the validity of the Jauch patent has been acknowledged by the manufacturers in the field. And here, as in the *Masonite* case, the horizontal combination among manufacturers has fixed uniform prices to which all the manufacturers, including the patentee, are bound to adhere. This combination: "actually or potentially, throttles or suppresses competing and non-infringing products and tends to place a premium on the abandonment of competition," and, therefore, is illegal *per se*.

The considerations showing the combination charged in the indictment to be illegal *per se* also serve to distinguish the instant case from *Bement v. National Harrow Co.*, 186 U. S. 70, and *United*

States v. General Electric Co., 272 U. S. 476. As those cases came before the Court they presented the question whether a patentee may issue a single license which binds the licensee to adhere to prices fixed by the patentee. (See 186 U. S. at 83-85 and 272 U. S. at 488.) In each case, the Court thought that the purpose and effect of the plan was to secure the patentee only a reward for his invention. But, in the instant case, the indictment charges mutual agreement among all the dominating manufacturers for the purpose and with the effect of fixing prices and eliminating competition; the combination therefore does not simply secure the patentee a reward for the invention but it unlawfully protects the patentee's position and the position of its former competitors against any effective price competition. See *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49; *United States v. Masonite Corp.*, 316 U. S. 265, 281-283.

Since the indictments clearly charge a conspiracy which is unlawful *per se* under the principles stated in the *Standard Sanitary* and *Masonite* cases, it is unnecessary to discuss at length the other respects in which the alleged conspiracy would restrain trade unlawfully. We shall show briefly, however, that there are at least three other reasons for holding that the indictment charges a violation of the Act. Each of them serves as an additional ground for distinguishing the *General Electric* and *Bement* cases.

1. *The indictment charges an unlawful conspiracy to pool, and suppress competition under, competing patents for the purpose of eliminating price competition.*—According to the indictment, it was part of the conspiracy that G & B, Tokheim, and Veeder place their patents under the control of Wayne and acknowledge the validity of the Jauch patent, and that G & B and Tokheim be licensed under that patent. Furthermore, the appellees were to induce all other manufacturers having patents to accept licenses under the Jauch patent, to acknowledge the validity of the Jauch patent, and to turn all their patents over to the control of Wayne. Neptune was to be compelled to acknowledge the validity of the Jauch patent, to cease manufacturing computing mechanisms except with the approval of Wayne, and to submit its patents to uses determined by Wayne. The indictment alleges that the purpose of these activities was to enable the appellees to fix prices. (R. 11-13.)

It is settled that such conduct violates the Sherman Act. This Court some time ago announced the principle that an agreement to combine patents for the purpose of effecting a monopoly or fixing prices is an unlawful restraint of trade. See *Standard Oil Co. v. United States*, 283 U. S. 163, 174-175. And numerous lower federal courts have applied the same rule. *Lynch v. Magnavox Co.*, 94 F. (2d) 883 (C. C. A. 9); *National Harrow Co. v. Hench*, 76 Fed. 667 (C. C.,

E. D. Pa. 1896), affirmed, 83 Fed. 36 (C. C. A. 3); *National Harrow Co. v. Quick*, 67 Fed. 130 (C. C. Ind. 1895), affirmed, 74 Fed. 236 (C. C. A. 7); *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. Mass. 1909); *United States v. New Departure Mfg. Co.*, 204 Fed. 107 (W. D. N. Y.); *United States v. Motion Picture Patents Co.*, 225 Fed. 800 (E. D. Pa.)

The court below in holding this conduct lawful relied upon the fact that the Jauch patent had been held valid and infringed by the Neptune computing mechanism. But this circumstance is unimportant. None of the other patents had ever been held invalid or to infringe the Jauch patent. Consequently, the court below was not warranted in assuming that the Jauch patent was any more valid than the others issued by the Patent Office. See *United States v. Masonite Corp.*, 316 U. S. 265, 280. The Jauch patent did not dominate the field by virtue of adjudication. It dominated by agreement only.¹³

Moreover, the indictment makes it clear that the filing and settlement of the Neptune suit, and the negotiations leading up to it, were all a part of the conspiracy and were done in furtherance of its objectives. The indictment alleges that in 1935 Wayne, with the consent of G & B and Tok-

¹³ It is significant on this aspect of the case that at least one of the officers of Tokheim recognized the "doubtful claims" of the Jauch patent and that the company therefore consented to the licensing of other companies "only under terms that will admit of price control" (R. 13-14).

heim, offered Neptune a license upon the condition that Neptune acknowledge the validity of the Jauch patent and turn over its patents to uses determined by Wayne. When Neptune refused this offer, Wayne offered to sell the Jauch patent to Neptune on condition that Neptune administer the licenses issued under the Jauch patent on terms established by Wayne. It was only upon the refusal of this second offer that Wayne, with the approval of G & B and Tokheim, instituted the infringement suit involving Neptune's computing mechanism. The litigation was never carried beyond the district court. Wayne and Neptune entered into a settlement by which it was agreed, among other things, that Neptune should acknowledge the validity of the Jauch patent in perpetuity; that the use of all patents for computing mechanisms owned, or thereafter acquired, by Neptune should be determined by Wayne, that Neptune should refrain from manufacturing any computing mechanisms except with the approval of Wayne, and that Neptune should sell only to customers approved by Wayne, G & B, and Tokheim. (R. 14-15.) It is obvious, of course, that the settlement went far beyond a mere composition of the matters in suit, and combined patents in violation of the Sherman Act. *Standard Oil Co. v. United States*, *supra*; *National Harrow Co. v. Hench*, 83 Fed. 36, 38 (C. C. A. 3).

2. *The indictment charges an unlawful conspiracy to use the Jauch patent to fix manufacturers'*

prices by joint action for the benefit of the patentee's former competitors.—The indictment alleges specifically that in accordance with the conspiracy Wayne, G & B and Tokheim were to agree upon a formula for determining manufacturers' prices and were to determine jointly other terms and conditions of sale; all three were to observe the prices, terms and conditions of sale thus determined, Wayne no less than the others. Likewise, it charges that Wayne, when G & B and Tokheim consented, was to induce other manufacturers to take licenses securing control of their prices to Wayne, G & B and Tokheim; and Wayne, G & B and Tokheim were to share both the royalties from the licenses and the litigation expenses incurred in enforcing them. • (R. 12-13.)

This then is not a case where the patentee by independent action has fixed the selling prices of his licensees for the purpose of protecting his monopoly and the pecuniary reward therefrom. This is a case of joint action among the three chief manufacturers of computer pumps directed to the end of protecting each other from competition. The patent was used merely as a means to this end; the licensees, G & B and Tokheim, had a voice in fixing the prices and Wayne, the patentee, bound itself to adhere to the prices fixed by agreement.

We submit that such an agreement violates the Sherman Act. A patent cannot be used to protect

from competition parties having no interest in the patent. *Interstate Circuit v. United States*, 306 U. S. 208; *United States v. Masonite Corp.*, 316 U. S. 265, 282. In the *Interstate* case the Court held (p. 230):

A contract between a copyright owner and one who has no copyright, restraining the competitive distribution of the copyrighted articles in the open market in order to protect the latter from the competition, can no more be valid than a like agreement between two copyright owners or patentees. [Citing cases.] In either case if the contract is effective, as it was here, competition is suppressed and the possibility of its resumption precluded by force of the contract. An agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted. The fact that the restraint is made easier or more effective by making the copyright subservient to the contract does not relieve it of illegality. * * *

It would seem to follow that a patentee may not surrender control over his prices to a competitor. Nor may he conspire with certain licensees to protect them from competition by inducing other competing manufacturers, selected by the conspirators jointly, to take licenses upon terms securing to the conspirators joint control of the licensees' prices.

3. *The indictment charges an unlawful conspiracy to fix resale prices.*—The indictment

charges that Wayne, G & B, and Tokheim agreed to fix resale prices for computer pumps and that they agreed to maintain those resale prices by a joint refusal to deal with price-cutting jobbers, by joint elimination of jobbers' discounts, and by the assistance of the Association in persuading jobbers to adhere to the resale prices agreed upon by these manufacturers (R. 12).

It is plain that these allegations charge an unlawful agreement to fix resale prices and to boycott non-adhering jobbers. The Jauch patent gave Wayne no right to fix the price at which computer pumps should be sold after they had passed out of the hands of Wayne and its licensees. *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436. *A fortiori* it was unlawful for appellees to fix resale prices by an organized boycott of non-complying jobbers. *Montague & Co. v. Lowry*, 193 U. S. 38; *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457. Since the basic unlawfulness of the acts charged inheres in the agreement among manufacturers to fix resale prices and to boycott jobbers who do not conform, and not in a vertical combination between a manufacturer and his distributors, the case of *United States v. Colgate & Co.*, 253 Fed. 522; affirmed, 250 U. S. 300, cited by the district court, is not in point. The acts and agreements charged are unlawful without any agreements with particular jobbers, because the ap-

pellees acted jointly to fix resale prices and to persuade and coerce jobbers to observe those prices.

B. THE MONOPOLY INDICTMENT

This indictment, we submit, alleges in clear and unmistakable terms unlawful conspiracies to monopolize the manufacture and sale of computer pumps (Count one) and the manufacture and ~~production~~^{sale} of computing mechanisms (Count two). Both of these counts contain allegations which are substantially the same as those in the price-fixing indictment, except that the charges of price fixing are omitted.

The manner in which the appellees conspired to accomplish their objectives is fully set out in the indictment. Prior to the execution of the conspiracies, the appellees and the other manufacturers in the field produced and sold computer pumps in competition with each other. Some of them produced computing mechanisms for use in their pumps and others bought such mechanisms. Also, prior to the execution of the conspiracies Neptune was engaged in manufacturing and selling computing mechanisms in competition with Veeder. (No. 82, R. 7-9.)

Under the terms of the conspiracies, however, G. & B. Tokheim, and Veeder were to place their patents on both computer pumps and computing mechanisms under the control of Wayne, accept licenses under the Jauch patent, and acknowledge

the validity of that patent. Wayne, G & B, and Tokheim agreed to purchase computing mechanisms only from Veeder and Veeder agreed to sell only to them and to other manufacturers approved by them (No. 82, R. 10.)

Next, Wayne, with the consent of G & B and Tokheim, was to induce all other manufacturers of computer pumps to accept licenses under the Jauch patent, acknowledge its validity, and turn over all their patents to the control of Wayne. Wayne was to license no one, however, except with the consent of G & B and Tokheim. In addition, Neptune was to be compelled to submit all patents owned or thereafter acquired to Wayne's control, acknowledge the validity of the Jauch patent, and refrain from manufacturing computing mechanisms except with the approval of Wayne. (No. 82, R. 11.)

The effects of these activities are also alleged in the indictment. In the computer pump field, all patents were placed under the control of Wayne, which was acting in collaboration with the other appellees; and all manufacturers were licensed under the Jauch patent. Thus, the appellees completely dominated and controlled the manufacture and sale, including the selling prices, of all computer pumps sold in the United States. And since 1937, when Wayne succeeded in securing control of Neptune's patents, the appellees have refused to license anyone else under the Jauch patent. (No. 82, R. 14.)

In the field of computing mechanisms, Neptune, who had been the sole competitor of Veeder in the manufacture and sale of such mechanisms to manufacturers of computer pumps, has been eliminated. Since 1938 Veeder has been the sole manufacturer of computing mechanisms in the United States. And Veeder by agreement has refused to sell to anyone except Wayne, G & B, and Tokheim, and other manufacturers licensed under the Jauch patent. (No. 82, R. 9-10.)

It is plain, therefore, that the indictment alleges conspiracies to monopolize the manufacture and sale of both computer pumps and computing mechanisms, which violate Section 2 of the Sherman Act, unless they are exempt from that Act by reason of the Jauch patent. *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129; *Standard Oil Co. v. United States*, 221 U. S. 1, 51-62, 70-77; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 465-468.

The district court did not hold otherwise; it justified the combinations only on the ground that they came within the patent privilege. We submit, however, that the monopolies which the appellees sought to and did secure went far beyond the monopoly granted by the Jauch patent. We have stated the reasons in discussing the price-fixing indictment. First, a patentee goes beyond his monopoly when he enhances his trade position by a horizontal combination with potential competitors under which they market only the pat-

ented article and thereby add to the monopoly of the patented article the advantages of impairing and eliminating actual or potential competition in competing but non-infringing devices. (See pp. 42-45, *supra*.) Second, as this Court expressly stated in *Standard Oil Co. v. United States*, 283 U. S. 163, 174-175, an agreement among competitors to combine patents for the purpose of creating a monopoly or fixing prices is within the prohibition of the Sherman Act. The same principle has been applied in numerous decisions in lower federal courts. See cases cited, pp. 46-47, *supra*. Third, whatever monopoly the issue of a patent may confer upon the patentee, he may not lawfully restrain trade to enable another manufacturer to achieve a monopoly position. (See pp. 48-50, *supra*.)

The lower court in holding the conspiracies lawful apparently relied entirely upon the fact that the Jauch patent had been held valid and infringed by a district court in a single infringement proceeding brought by Wayne involving Neptune's computing mechanisms. From this decision the court concluded that the Jauch patent dominated the field, that all manufacturers of computer pumps or computing mechanisms would be infringers, and that it was therefore lawful for the appellees to combine for the purposes set forth in the indictment. But none of the other patents in the field had been held to conflict with or infringe

the Jauch patent and it cannot be assumed, in the absence of an adjudication, that one patent is any more valid than another or that non-infringing devices satisfying the public demand cannot be developed under the incentive of competition. *United States v. Masonite Corp.*, 316 U. S. 265, 280-282. Even as regards the Neptune device in suit, moreover, the filing and settlement of the infringement suit, and the negotiations preceding it, were all charged in the indictment to be a part of the conspiracies and were performed for the purpose of effectuating their objects. See pp. 47-48, *supra*.

CONCLUSION

It is respectfully submitted that this Court has jurisdiction of these appeals and that the judgments from which the appeals were taken should be reversed.

✓ CHARLES FAHY,
Solicitor General.

✓ THURMAN ARNOLD,
Assistant Attorney General.

KENNETH L. KIMBLE,
Special Assistant to the Attorney General.

✓ ARCHIBALD COX,
ROBERT DILLER,
Attorneys.

OCTOBER 1942.

